Human rights, criminal law: pas de deux ou faux amis?

Why international law acknowledges crimes without criminals

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International Human Rights Law (IHRL) and International Criminal Law (ICL) may be historically entwined yet are unduly conflated. Teleologically, the division is clear: IHRL primarily deals with state responsibility, while ICL seeks to establish individual criminal liability. But as aptly illustrated by the standards of evidence respectively applied by human rights and criminal law tribunals, the disciplines' shared vocabulary blurs that distinction. The IHRL-ICL divide is thus a tale of false friends – one where legal doctrine is similar in term though not in tenor.

The European Court of Human Rights (ECtHR), for example, borrows from criminal law lexicon by adopting a high standard of "proof beyond reasonable doubt" as its threshold for state responsibility. Yet in that same breath, the ECtHR interprets the law in favour of human rights and shifts the burden of proof to the respondent state. This approach, referred to as the principle of *pro homine,* is likewise reflected in the methodology of the Inter-American Court of Human Rights.

On the other hand, at the core of international criminal justice lies the principle of *in dubio pro reo* – itself a component of the human right to the presumption of innocence – which not only prohibits shifting the burden of proof but also resolves doubts in favour of the accused. Article 22 of the Rome Statute (RS) echoes that principle by requiring the definition of a crime to be "strictly construed" and, "[i]n case of ambiguity, […] interpreted in favour of the person being investigated, prosecuted or convicted." Though at the same time, Article 21(3) requires the "application and interpretation of law […] be consistent with internationally recognized human rights"; thus opening stringent criminal law floodgates to the more lenient *pro homine* presumptions, where ambiguities are interpreted in favour of the claimant-rights holder.

What is more, the strict interpretative rules of ICL are likewise softened by the ICC's reliance on Article 31 of the Vienna Convention on the Law of Treaties of 1969 (VCLT). Though the RS is indeed – as a treaty – subject to VCLT rules, the principle of *nullum crimen sine lege stricta,* which it codifies, is effectively overtaken by supra rules of statutory method. In the face of ambiguity, Article 22 of the Statute adopts strict legal constructivism in favour of the person being investigated, prosecuted or convicted. The VCLT, however, takes a neutral stance; informing textual ambiguities with meaning by looking at a treaty's object and purpose. While Article 22 RS pulls in a direction favourable to the accused, Article 31 VLCT makes no such promise.

The criminal law 'presumption in favour of the accused' is quietly undermined by the general rules of treaty interpretation – an issue highly contested yet underdeveloped.

If taken as a single set of rules, the realm of public international law weaves a tangled web. When applied to the same factual scenario, these rules may elicit different and at times difficult results where systematic violations of human rights are established but criminal processes have not or have only barely commenced. Myanmar's reported Genocide of the Rohingya, the judicially recognized War Crimes in Afghanistan, and the internationally condemned Crimes Against Humanity of the *Dutertian* drug war in the Philippines – all these involve mass atrocities duly established yet either awaiting or pending judicial scrutiny. These situations taken together show how the violation of IHRL involves a separate and distinct discourse from international criminal liability. One could ask: Is international criminal justice mere rhetoric?

IHRL-ICL Divide: An Epistemological Distinction

Such is the predicament of the human rights advocate: While grave atrocities may be proven beyond question, individual liability remains uncertain. But what begins as doctrinal conflation spirals into a paradigmatic paradox; causing amongst the layman and the legal mind alike misunderstanding and, worse, undue expectation.

It is said that the fairness of any criminal justice system should not be adjudged by convictions but acquittals. That apothegm seems to be lost to many when it comes to the ICC which has been on the receiving end of criticism amidst its decisions acquitting Jean-Pierre Bemba, Laurent Gbago and Charles Blé Goudé. The acquittal of Jean-Pierre Bemba, in particular, was criticized to have effectively adjudged "crimes […] to have committed themselves". That view, however, fails to acknowledge the fine distinction between IHRL and ICL. When the subject of the law shifts from the state to the individual, there is a concomitant change in rules. The critique thus fails to make the required code-switch from IHRL to ICL and assumes that establishing human rights violations goes hand in hand with criminal liability.

This dilemma could be completely avoided by distinguishing either discipline from the other. While IHRL and ICL share in the fuel of noble convictions, the research invites caution from over-romanticizing *droit pénal* as *droits de l'homme*. They may be equally valued in the international justice experiment, but that is not to say they are co-extensive. They differ in application, procedure, material scope and institutional bias. Indeed, unlike the *pro homine* implications ingrained in IHRL, there is no presumption of liability in ICL. On the contrary, the prosecutorial process is far from levelled and leans in favor of the defendant.

Unlike the state, the accused's innocence is not only a possibility, it is a time-honored, though rebuttable, presumption. Equating criminal acquittals with "[c]rimes adjudged to have committed themselves" thus ignores the legal differences, and at times, disagreements between crime and culpability. The critique fails to view IHRL and ICL as separate disciplines; as if finding for state responsibility comes hand in hand with individual liability. The gaps betwixt contexts of criminality, on one hand,

and criminal conduct and the criminal mind (*actus reus* and *mens rea*), on the other, remain to be bridged.

Of Having Crimes Without Criminals

Disappointment finds its place within the grey in-betweens of expectation and reality. The frustrations felt by the international community with the international justice experiment, though not entirely without bases and at times painful and true, is largely a product of false expectancy. IHRL and ICL are not engaged in a *pas de* deux, but are *faux amis* with their own steps, swaying to their own rhythm. While Human Rights primarily seeks justice for victims, prosecutorial strategy primarily seeks to establish guilt à la Al Capone. It is the failures to recognize that difference that leaves the human rights advocate wanting. It is necessary to separate the advocate from the advocacy by emphasizing how the success of ICL rests neither on acquittals nor convictions but on the reconceptualization of International Criminal Tribunals *qua* criminal courts.

The laws on individual criminal liability have erroneously relied on traditional, state-centric rules of treaty interpretation. In stages involving the rights of the accused, the principle of *in dubio pro reo* should supersede, rather than be suppressed by, *pro homine* presumptions and VCLT-rules. While human rights mechanisms involving fact-finding and state responsibility may establish criminality, ICTs grapple with establishing criminal liability. This variance in objective brings with it just as varied rules. While establishing criminal contexts is pitted against lower thresholds of evidence (e.g. reasonable conclusion, substantial evidence, clear and convincing evidence), finding criminal culpability must hurdle the high evidentiary threshold of proof beyond reasonable doubt.

The IHRL-ICL divide involves not only teleological differences but epistemological distinctions. Highlighting the fine line of divergence demonstrates why international law acknowledges crimes without criminals.

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